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IN THE

Supreme Court of the United States

October Term, 1966

No. 840

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS DEJOY,

Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

BRIEF IN OPPOSITION

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PAGE

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
QUESTION PRESENTED	2
STATEMENT	2
The Health Code Fluoridation Amendment	2
Problem of Children's Dental Health	3
Basic Physiological Facts Regarding Fluoridation	5
Safety of Fluoridation and Absence of Appreciable Physiologic Effects Therefrom Upon Adults	6
POINT I—This Court has repeatedly ruled, in fluoridation cases raising every claim of unconstitutionality here asserted, that this health measure presents no substantial question of violation of constitutional rights	7
a. Growth of the practice of fluoridation under the sanction of unanimous judicial decisions sustaining constitutionality	7
b. Dismissals of fluoridation appeals by this Court, for want of a substantial federal question	8
c. Denials of certiorari in fluoridation cases	9
POINT II—The City's fluoridation program does not violate constitutional rights, since it immunizes children to avert a serious threat to their health and to enhance the public health generally without appreciably affecting the bodily functions or personal existence of adults	10
CONCLUSION	14

TABLE OF AUTHORITIES

PAGE

Cases:

Birnel v. Town of Fircrest, 361 U. S. 10 (1959), rehearing den., 361 U. S. 904 (1959) 8, 9, 12

Chapman v. City of Shreveport, 348 U. S. 892 (1954) 8, 9

DeAryan v. Butler, 347 U. S. 1012 (1954) 9
Dowell v. City of Tulsa, 348 U. S. 912 (1955) 9, 10

Equitable Life Assurance Society v. Brown, 187 U. S. 308 (1902) 9

Jacobson v. Massachusetts, 197 U. S. 11 (1905) 11

Kraus v. City of Cleveland, 351 U. S. 935 (1956) 8, 9

Ohio *ex rel.* Eaton v. Price, 360 U. S. 246 (1959) 9

Paduano v. City of New York, 18 N Y 2d 721 (1966) 2
Paduano v. City of New York, 17 N Y 2d 875 (1966) 1
Paduano v. City of New York, 24 A D 2d 437(6) (1965) 1
Paduano v. City of New York, 45 Misc 2d 718 (1965) 1, 2, 4, 6, 7
Prince v. Massachusetts, 321 U. S. 158 (1944) 14

Readey v. St. Louis County Water Co., 371 U. S. 8 (1962), rehearing den., 371 U. S. 906 (1962) 9, 10
Roschen v. Ward, 279 U. S. 337 (1929) 11
Roschen v. Ward, 29 F. 2d 762 (1928) 11

Schuringa v. City of Chicago, 379 U. S. 964 (1965) 9, 10

U. S. v. Carolene Products, 304 U. S. 144 (1938) 11

PAGE

Constitutional Provisions:

The Constitution of the United States
Fifth Amendment 2
Ninth Amendment 2
Fourteenth Amendment 2

Local Enactment:

New York City Health Code, §141.08 2

Article:

New York Times, Feb. 8, 1966, p. 18 7

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Respondents.

BRIEF IN OPPOSITION

Opinion Below

The decision of the New York Court of Appeals, affirming, without opinion, the order of affirmance of the Appellate Division, is reported at 17 N Y 2d 875. The Appellate Division had affirmed on the opinion below. 24 A D 2d 437(6). The opinion of Special Term of the New York Supreme Court, thus affirmed, is reported at 45 Misc 2d 718.

The Court of Appeals, in amending the remittitur, stated that it had held that the City's "fluoridation program does not constitute a significant invasion of fundamental rights" (18 N Y 2d 721).

Question Presented

In view of the children's dental health problems confronting the City of New York, are any rights of adults to privacy, equal protection or due process under the Fifth, Ninth and Fourteenth Amendments violated by fluoridation of the City's water supplies in order to protect the health of children and foster the public health generally?

Statement

The Health Code Fluoridation Amendment

Fluoridation of the City's public water supplies is required by an amendment to the City's Health Code adopted by the City Board of Health, effective April 7, 1964 (City's printed papers,* pp. 7-8, App. to Pet., p. 2A, where the text of the amendment, adding new §141.08, is set forth). As Special Term pointed out, provisions of the City Health Code have the force and effect of State law (App. to Pet., p. 3A).

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* References to "City's printed papers" in this brief denote page numbers of the City's printed affidavits and exhibits in support of its motion for judgment and in opposition to Petitioners' motion for a temporary injunction. These papers are bound in an indexed booklet, with printed pagination from pp. 1-205. The booklet is designated as item No. 18 in the N. Y. County Clerk's certificate listing the papers constituting the record (Petition, pp. 5-6).

The Board took this step in order to cope with a major health problem threatening the welfare of 500,000 of the City's children (*infra*, this page and pp. 4-5).

The Health Code amendment, in accordance with the standards prescribed by the United States Public Health Service, specifies in substance that the City's public water supplies shall be treated so as to provide therein a concentration of approximately 1 part per million of the fluoride ion (one pound of fluoride to one million pounds of water), but not in excess of 1.5 parts per million (City's printed papers, p. 8).

Fluoridation of the City's water supplies was begun in the autumn of 1965, following installation of the necessary equipment, and has continued since.

Problem of Children's Dental Health

Studies by the City Department of Health show that of the million children in the City's elementary and junior high schools (public and parochial), approximately 380,000 receive no dental care whatsoever and an additional 120,000 receive inadequate dental care (*id.*, pp. 18-19). This deplorable situation results from family poverty and like factors which are persistent social problems (*id.*, p. 18). The dental services provided by the City Department of Health can meet only one-tenth of the dental needs of these unfortunate children (*id.*, p. 19). It would be impossible to expand these services to furnish the necessary care, even if funds for expansion could be found, because there are not enough dentists in the City who could be enlisted in such projects (*ibid.*).

Where children undergoing such conditions of dental neglect grow to maturity without the benefits of a preventive program, they must inevitably form a large population group burdened and handicapped with lifelong impairment of health and appearance, and suffering heavy economic loss, in terms of constant need for expensive dental care.

There is no controversy as to the foregoing facts. Special Term, with the unanimous concurrence of the Appellate Division, declared: "It is not disputed that * * * tooth decay and dental neglect among 500,000 of the City's children presents a growing public health problem" (App. to Pet., p. 8A).

Numerous scientific studies demonstrate that fluoridation reduces tooth decay among children by 60%-65% (City's printed papers, pp. 19, 40-41). The Petition does not dispute these benefits (Pet., p. 4).

Before adopting the Health Code fluoridation amendment, the City Board of Health carefully investigated the various claimed alternatives to fluoridation, from the standpoint of effectiveness, safety, practicability and scientific validity (City's printed papers, pp. 41-42). The Board found that none of these proposals measured up to these criteria (*ibid.*). For example, in a community in Hawaii having over 4,000 children, it was found after 4 years of experience with a program of administering fluoride tablets, that 1 child out of 8 was taking the tablets (*id.*, p. 41). The Board concluded that fluoridation is the only proven, practicable solution for the major health problem presented by the large proportion of the City's children who are without proper dental care (*id.*, pp. 18-19, 40-42).

Special Term, in effect rejecting the claim of availability of other remedies, stated (App. to Pet., p. 9A):

> "It is also clear that fluoridation is effective in combatting dental caries among the young, and its effects last through adulthood. Fluoridation of the water supply is also the most efficacious, probably the cheapest, and may be the only practical method of insuring the administration of this drug to the very young."

Basic Physiological Facts Regarding Fluoridation

All human beings regularly consume fluorides in their food and, in most cases, in their drinking water, regardless of whether they live in communities which fluoridate their water supplies (City's printed papers, pp. 23-24, 56). Fluorides are naturally present in almost all water supplies (*id.*, pp. 16, 23-24). New York City's water (prior to fluoridation) contained .1 part per million of fluoride (*id.*, p. 23). Fluoridation, therefore, does not mean that a new chemical is introduced into the human body. Everyone consumes fluorides, whether or not the water supplies are municipally fluoridated.

Consumption of fluoridated water builds resistance to tooth decay only during the period of tooth formation, i.e., the first 8-10 years of life (*id.*, pp. 19, 40-41). While consumption of fluoridated water at other ages does not result in this immunizing process, studies show that the heightened immunity to dental caries and other dental benefits acquired by children living in fluoridated communities continue into adult life (*id.*, p. 41). Moreover, in a fluoridated community, eventually every native resident has healthier, more intact teeth, because of the benefits received by all such persons in childhood.

Safety of Fluoridation and Absence of Appreciable Physiologic Effects Therefrom Upon Adults

The City's affidavits, hearing testimony and exhibits, submitted in support of its motion for judgment, set forth the principal elements of the scientific evidence and data which, in the judgment of the leading health authorities of the Nation and the vast majority of qualified scientists, establish the safety and efficacy of fluoridation beyond a reasonable doubt (*id.*, p. 9). Special Term ruled in effect that Petitioners' affidavits and exhibits in opposition did not offer any scientific evidence or proof to the contrary, but rather expressed minority opinions as to the conclusions which may properly be drawn from the known scientific facts. Terming these minority theories as to alleged deleterious effects "purely speculative", Special Term declared in substance that Petitioners had failed to produce any proof that "fluoridation has harmful side effects" (App. to Pet., p. 14A).

The record, therefore, not only demonstrates that fluoridation is safe, but also that it has no significant physiological effects (side effects) on adults.

POINT I

This Court has repeatedly ruled, in fluoridation cases raising every claim of unconstitutionality here asserted, that this health measure presents no substantial question of violation of constitutional rights.

a. Growth of the practice of fluoridation under the sanction of unanimous judicial decisions sustaining constitutionality

Under the sponsorship of the United States Public Health Service and state and local health agencies, and with the approval of the American Medical and Dental Associations and the most respected and authoritative scientific organizations of this country, approximately 60,000,000 people in the United States are presently consuming municipally fluoridated water (N. Y. Times, Feb. 8, 1966, p. 18). Special Term pointed out that fluoridation has been practiced in the United States as a public health measure for twenty years (App. to Pet., p. 9A).

During this period, fluoridation has been challenged in the courts of many states on constitutional grounds. These attacks have been rejected with complete unanimity. Decisions of the highest courts of ten states to this effect are cited in the opinion of Special Term (App. to Pet., pp. 12A-13A).

In seven cases, unsuccessful attempts were made to obtain review in this Court.

b. Dismissals of fluoridation appeals by this Court, for want of a substantial federal question

In three of these cases, appeals to this Court were dismissed for want of a substantial federal question. *Chapman* v. *City of Shreveport,* 348 U. S. 892 (1954); *Kraus* v. *City of Cleveland,* 351 U. S. 935 (1956); *Birnel* v. *Town of Fircrest,* 361 U. S. 10 (1959), rehearing den. 361 U. S. 904 (1959).

In these three cases, every claim of unconstitutionality asserted by petitioners here was presented to this Court in the jurisdictional statements. In these statements, contentions were made that appellants' constitutional rights were being violated in that fluoridation (references denote pages in the jurisdictional statements):

(1) constitutes compulsory medication (*Chapman,* pp. 4, 6-7; *Kraus,* pp. 4, 10; *Birnel,* p. 4);

(2) is or may be harmful to health (*Chapman,* pp. 4, 6; *Kraus,* p. 10; *Birnel,* pp. 6-7);

(3) is directed against a non-contagious disease (*Chapman,* p. 4; *Kraus,* p. 22; *Birnel,* p. 10);

(4) was imposed although other, allegedly safer methods of administering fluoride to children are available (*Kraus,* p. 11; *Birnel,* pp. 7, 9); and

(5) denies equal protection (*Chapman,* p. 4; *Kraus,* pp. 3-4).

It is evident that petitioners, in arguing here that fluoridation violates privacy and bodily integrity in contravention of the Ninth and other Amendments, are simply stat-

ing, in different words, the "compulsory medication" contention which was ruled insubstantial in *Chapman, Kraus* and *Birnel.*

The dismissals in these three cases are decisions on the merits. *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246, 247 (1959); *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311, 315 (1902).

c. Denials of certiorari in fluoridation cases

In four cases wherein the constitutionality of fluoridation was upheld by highest State courts, this Court denied certiorari. *DeAryan* v. *Butler,* 347 U. S. 1012 (1954); *Dowell* v. *City of Tulsa,* 348 U. S. 912 (1955); *Readey* v. *St. Louis County Water Co.,* 371 U. S. 8 (1962), rehearing den. 371 U. S. 906 (1962); *Schuringa* v. *City of Chicago,* 379 U. S. 964 (1965).

The petitioners in these cases sought to present to this Court every question of constitutionality raised by Petitioners herein.

The questions alleged were (references denote pages in the petitions for certiorari):

(1) compulsory medication (*DeAryan,* p. 8; *Dowell,* pp. 2-3; *Readey,* pp. 2, 7-8, 16; *Schuringa,* pp. 2-3);

(2) alleged dangers to health (*Readey,* p. 7; *Schuringa,* pp. 2-3);

(3) alleged want of power to act against a non-contagious disease (*Dowell,* pp. 2-3; *Readey,* p. 9);

(4) alleged lack of power because of absence of a public emergency endangering health (*Dowell*, pp. 2-3; *Schuringa*, pp. 2-3);

(5) alleged availability of other methods of protecting teeth (*Readey*, pp. 8-9); and

(6) denial of equal protection (*Dowell*, pp. 2-3; *Readey*, pp. 2, 7-8).

POINT II

The City's fluoridation program does not violate constitutional rights, since it immunizes children to avert a serious threat to their health and to enhance the public health generally without appreciably affecting the bodily functions or personal existence of adults.

(1)

Petitioners' contentions of unconstitutionality consist in essence of the claim that fluoridation imposes compulsory medication or forces consumption of a drug or chemical by individuals, thereby subjecting them to possible dangers to health or to unwarranted impingement upon their bodily processes (Petition, pp. 3-5, 7).

This claim, however, is constructed upon hypotheses that fluoridation has or may have some harmful or other perceptible effects upon adults. As has been shown *supra*, pp. 5-6, such contentions as to untoward effects are directly contradicted by the physiological facts of fluoridation, as established by the record.

The Petition (pp. 4-5), suggesting possibilities of dangers to health, refers to the granting of summary judgment for Respondents without a trial as to the safety of fluoridation and asserts that this raises an issue of due process and equal protection (despite admissions by Petitioners that a preponderance of the scientific evidence and opinion sustains the safety of fluoridation*).

This contention, however, overlooks the precedents demonstrating that where the validity of police power legislation is challenged, the courts may find, without a trial, that a rational basis sustaining the legislation is established by documentary evidence, including affidavits submitted by the health authorities (*Roschen* v. *Ward,* 279 U. S. 337 [1929], affirming 29 F. 2d 762 [Dist. Ct., S. D., N. Y., 1928]) or scientific literature and reports of legislative hearings (*U. S.* v. *Carolene Products,* 304 U. S. 144 [1938]). Controlling here also is *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30, 35-36 (1905), where this Court, in upholding compulsory vaccination, ruled that, if it is evident that there is a rational basis for health legislation involving disputed scientific issues, it is not the function of the courts to decide which group of scientists is right. It should be

* Petitioners attached to their affidavits, as a "thorough scientific analysis and survey of the fluoridation situation" (Paduano affidavit, original Special Term papers, pp. 453-454 [as numbered in the N. Y. County Clerk's certificate listing such papers]), a "Saturday Review of Literature" editorial, appearing in the "Saturday Review" issue of February 15, 1964, which states that the "preponderance of the evidence favors the position of the proponents of fluoridation that side effects are negligible."

Moreover, attached to and made a part of the affidavit of one of Petitioners' affiants is the 1952 report of a select Congressional committee on fluoridation which declares that majority scientific opinion in this country holds that fluoridation "presents no hazard to the public health" (*id.*, p. 693).

noted, moreover, that the *Birnel* decision of this Court (*supra,* p. 8), dismissing a fluoridation appeal, dealt with the dismissal of a complaint.

Petitioners are adults and they do not complain that the immunizing process of fluoridation violates the constitutional rights of children. Petitioners may, therefore, assert only their own alleged constitutional grievances as adults.

As has been demonstrated, the record in this case establishes that fluoridation creates no hazards to health and has no appreciable physiological effects on adults. Consideration of Petitioners' contentions of unconstitutionality, therefore, must be based upon the facts as so established.

(2)

Fluoridation of the City's water supplies does not impinge on individual liberty in any significant respect. The City's Health Code amendment prescribing fluoridation does not compel any person to consume fluoridated water or impose penalties for failure to do so. Unfluoridated drinking water is obtainable from suppliers by those who disagree with the Nation's health authorities. It is also common knowledge, as a result of advertising, that relatively inexpensive defluoridating devices, for home use, are on the market.

Those who drink water from the City's public supplies consume harmless amounts of fluorides in addition to the other chemical additives present therein, such as chlorine, copper sulphate and alum (City's printed papers, p. 24).

Fluoridation does not in any way affect the taste or quality of water, since its fluoride content is tasteless and odorless (*id.*, pp. 23-24, 180-181). Thus, the presence of added fluoride in water supplies causes no inconvenience to any person consuming such water and produces no appreciable impact upon individual pursuits. If it can be claimed that any privilege of the individual is lost through fluoridation, it is the purely abstract and inconsequential privilege of drinking public water supplies without consuming one additional harmless additive which, for all practical purposes as to adults, is inert. This cannot be deemed a significant loss of personal liberty when it is balanced against the important gains in public health produced by fluoridation.

Various combinations of chemicals selected from an assortment of some nine different products are commonly used throughout the United States as additives to municipal water supplies. Some of these chemicals are employed to effect purposes having no connection with the killing of disease-producing organisms or the potability of water. For example, calgon is added to the water in some communities to soften it.

No person consuming municipal water supplies can reasonably contend that he is being "medicated", "treated" or affected by any of these chemicals. This is so because it is scientifically established that ingestion of the minute amounts of such chemicals added to drinking water has no appreciable physiological effects. On the record in this case, adult consumption of the minute amounts of fluoride present in fluoridated water has equally insignificant effects and should, as a matter of logic, be regarded in the same light.

Petitioners' equal protection argument, of course, disregards the fact that fluoridation benefits the entire community, as well as its children, since eventually all residents will have received the immunization benefits in their childhood. It is obvious that fluoridated water cannot be provided to the children in a manner assuring that they will drink it, except by fluoridating the entire City system of public water supply.

Even if the City's fluoridation program were viewed as having a significant impact on adults, Petitioners would fall far short of showing a constitutional grievance. The record in this case clearly establishes a compelling necessity for this program as the only practicable means whereby the dental health of the City's children may be protected and a major public health problem alleviated. In the light of "the interests of society to protect the welfare of children" (*Prince* v. *Massachusetts,* 321 U. S. 158, 165 [1944]), the urgency of this need and the magnitude of the problem plainly satisfy the "subordinating interest" test (Petition, pp. 14-15) and any other standard which may be invoked as a test of valid exercise of the police power.

Conclusion

The Petitioners repeat contentions of unconstitutionality which were submitted to this Court and denied review on seven prior occasions. In three of these instances, this Court ruled, in decisions on the merits, that these contentions do not raise substantial constitutional questions. For twenty-one years, fluoridation has subsisted and grown as a nation-wide public health practice, under the imprimatur of

constitutionality provided by the reiterated, unanimous rejection of these contentions by this Court and many State courts. Petitioners have shown no grounds for a reexamination of these rejected arguments now.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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